SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 146.

THE THIRD NATIONAL BANK OF BUFFALO, N. Y., PLAINTIFF IN ERROR,

vs

THE BUFFALO GERMAN INSURANCE COMPANY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

BRIEF FOR THE BUFFALO GERMAN INSURANCE COMPANY, THE DEFENDANT IN ERROR.

HISTORY OF THE CASE.

This case has been twice tried, and has been twice to the Appellate Division of the Supreme Court and twice to the Court of Appeals of the State of New York. The first trial resulted in a judgment for plaintiff in error on the authority of the case of *National Bank vs. Whitney*, 103 U. S. 99. When first before the Appellate Division (29 Appellate Division, 137) Mr. Justice ADAMS wrote the prevailing opinion (Justices HARDIN and FOLLETT dissenting) and in that opinion he seemed to reach the conclusion that the defendant's in error claim was correct, but that the decision in *Bank vs. Whitney*, 103 U. S., 99 was controlling.

The Court of Appeals took a different view of the matter and

(in 162 N. Y., p. 168), Justice GRAY writing the opinion, unanimously reversed the judgment of the Appellate Division, making the distinction claimed by counsel for defendant in error between a security actually taken, though in violation of law and the creating of a forbidden constructive or equitable lien where no security was actually taken. In other words, holding that the Bullard class of cases, in the brief and opinion referred to, did not conflict with the Whitney class of cases.

Under the decision of the Court of Appeals reversing the trial Court the case went back for a new trial at the Erie Equity Term of the Supreme Court of the State of New York, Mr. Justice LAMBERT presiding, October 16, 1900, and resulted in a judgment for the defendant in error. The defendant Bank appealed from that judgment to the Appellate Division of the Supreme Court which affirmed the judgment, and from that judgment the defendant Bank appealed to the Court of Appeals of the State of New York, which latter Court affirmed the judgment in favor of the defendant in error (171 N. Y., 670) on the opinion in its former decision in favor of defendant in error reported in 162 N. Y., 163.

There was no change in the facts presented on the two appeals to the Court of Appeals except that the Bank eliminated the flimsy evidence upon which it based its claim for a verbal pledge of the stock without delivery and obtained a finding (Finding 15). That October 1, 1890, Emanuel Levi applied for a further loan of $12,000 (from Bank) and proposed to secure the same by note made by himself and endorsed by his son Louis Levi, and to treat and consider as delivered to the Bank the stock which he owned in that corporation and which was then in the safe deposit vaults of the Buffalo Loan & Trust Co., as security for the payment of its indebtedness and the loan that day made. The evidence showed, and the fact being, that Levi alone had control of the property in the Safe Deposit Company.

The only other changes in the findings were the insertion of the 13th, 14th, 16th, 17th and 18th findings, which on the former trial and appeals were shown by the undisputed evidence. There has been no change in the findings more favorable to the Bank.

The case was therefore the same case as was decided by the Court of Appeals on the former appeal. Mr. Justice LAMBERT so held and decided the case without writing any opinion. The Appellate Division so held in affirming that judgment without opinion. (61 Appellate Division, 612.)

On the first appeal all of the evidence was taken to the Court of Appeals on a case containing exceptions; on the second appeal the Bank appealed on a Bill of Exceptions alone, leaving out the evidence, presumably because it weakened its flimsy claim of a verbal pledge of the stock without delivery upon which the finding of fact XV is founded (Fol. 23.)

The defendant Bank, Plaintiff in Error herein, sued out the writ of error to review the judgment entered on the decision of the Court of Appeals.

FACTS.

This action was brought by the defendant in error to compel the plaintiff in error to transfer to such defendant on the books of such plaintiff four hundred and fifty shares of its capital stock, of which the defendant in error claims to be the owner by purchase, as hereinafter set forth.

The shares of stock were originally issued to Emanuel Levi and were evidenced by certificates numbered B—58, B—59, B—60, B—61 and B—62, aggregating four hundred and fifty shares of the par value of $45,000 upon which he borrowed of defendant in error as hereinafter set forth $55,000, pledging and delivering to it all of said certificates of stock.

The plaintiff in error is a National Banking Corporation, organized under the Act of Congress of 1864, its certificate of organization being filed February 14, 1865. Its said certificate of stock were all in the following form:

"Number———— Shares——

STATE OF NEW YORK,
THIRD NATIONAL BANK
OF BUFFALO.

This is to Certify that Emanuel Levi is the owner of shares of One hundred dollars each of the capital stock of the Third National Bank of Buffalo, subject to the lien

or liens referred to in section fifteen of the by-laws of said bank in the following words:

'No transfer of the stock of this association shall be made without the consent of the Board of Directors, by any stockholder, who shall be liable to the association either as principal debtor or otherwise, which liability shall be a lien upon the said stock and all profits thereof and dividends.'

And that the said stock is transferable only upon the books of the bank by him or his attorney on the surrender and cancellation of this certificate and compliance with said by-laws.

Dated, at Buffalo, N. Y., this day 18 .

CHARLES A. SWEET, President

N. ROCHESTER, Cashier."

On the third day of December, 1900, said Emanuel Levi being then the owner of said certificates of stock, borrowed from said Bank the sum of Twenty-five thousand dollars, payable on demand, giving therefor his promissory note, and an assignment of said certificates of stock as follows:

"Know all men by these presents, That I, Emanuel Levi, for value received, have bargained, sold, assigned and transferred, and by these presents do bargain, sell, assign and transfer unto The Buffalo German Insurance Company 250 shares of the capital stock of the Third National Bank of Buffalo, being certificates B—60, B—61, and B—62, standing in my name on the books of the Third National Bank. I do hereby constitute and appoint John P. Diehl Chairman of the Finance Committee of the Buffalo German Insurance Company, my true and lawful attorney, irrevocable for me and in my name and stead, but to use, to sell, assign, transfer and set over all or any part of the said stock and for that purpose to make and execute all necessary acts of assignment and transfer, and one or more persons to substitute with like full power, hereby ratifying and confirming all that the said attorney, or his substitute or substitutes, shall lawfully do by virtue hereof.

In Witness Whereof, I have hereunto set my hand and seal the third day of December, 1890.

EMANUEL LEVI." [L. s.

And a certain other paper as follows:

"Received, Buffalo, December 3d, 1890, of the Buffalo German Insurance Company of Buffalo, N. Y., Twenty-five thousand dollars under an account opened by me with said company, to be returned on call, with interest at the rate of six per cent. per annum; and as collateral security for the payment thereof I have assigned to said company.

Ctf. B—60 Third National Bank, Buffalo, $10000.
" B—61 " " " " $10000.
" B—62 " " " " $5000.

In case I shall refuse or neglect to pay the said principal and interest on call, I do hereby authorize the said company to sell the said securities at public or private sale on notice of five days by letter mailed to my address at Buffalo, N. Y. And from the proceeds thereof, after deducting all costs and expenses, to satisfy the said principal and interest, rendering the surplus, if any, to the undersigned.

EMANUEL LEVI."

And on said day the said Levi delivered the said note, assignment and receipt, together with the stock so assigned, to the Insurance Company, receiving in return therefor its checks aggregating Twenty five thousand dollars, which checks he afterwards endorsed and received the money thereon.

On August 13, 1891, the said Levi borrowed from the Insurance Company an additional Twenty thousand dollars, giving to it assignment of certificates B—58 and B—59 of the stock of the Bank of the par value of Twenty thousand dollars as security for the payment of his demand note for said sum, and interest, and then delivered to said Company said note, said certificates of stock and the assignment there of, together with a receipt similar to the one above set forth.

On May 25, 1892, the said Levi borrowed from the Insurance Company an additional Ten thousand dollars, giving to it an assignment of all the certificates of stock hereinbefore mentioned as security for the payment of his demand note for said sum and interest, and then delivered to said company said note, an assignment of said stock and another receipt as above set forth, all

the certificates of stock so then assigned being in the possession of the said Insurance Company.

That ever since said stock and the several certificates thereof were delivered to the Insurance Company, they have been in its possession and are now held by it.

That before the commencement of this action, and prior to the demand and notice hereinafter mentioned, the said Emanuel Levi died, and thereafter Rosa Levi and Louis E. Levi were duly appointed his executors, and qualified as such.

Interest on said demand notes was paid to January 1st, 1896, except the sum of Three hundred dollars, leaving due and unpaid on said loans the sum of Fifty-five thousand dollars of principal, said Three hundred dollars interest, and interest from January 1st, 1896.

On June 9th, 1896, the Insurance Company made a demand in writing upon the said executors of the said Emanuel Levi for the payment of said notes, and to redeem the said stock, and gave them notice that in the event of their failure to pay said debt and to redeem said stock on or before the 16th day of June, 1896, the said stock would be sold and the proceeds thereof used to liquidate the said indebtedness. That a copy of the notice and demand so served upon each of said executors was introduced in evidence.

On June 22, 1896, the said debt not having been paid, nor said stocks redeemed, the Insurance Company caused a notice of the sale thereof on the 30th day of June, 1896, at 10 o'clock in the forenoon, to be served upon each of the executors of said Emanuel Levi, and also caused three copies of such notice to be posted in three public places in the City of Buffalo.

On the 30th day of June, 1896, at the time and place mentioned in said notice, the Insurance Company offered the said stock for sale to the highest bidder, the said Bank being then present by its attorney, and said executors being present by their attorney and by Louis E. Levi, in person; other persons were also present. The Bank by its attorney gave notice that it claimed a lien upon the said stock, which notice was introduced in evidence, and also stated that it held stock of the Buffalo German Insurance Company and of the German Bank, aggre-

gating the par value of Two thousand dollars, as further security for part of the amount for which it claimed a lien on said stocks then offered for sale.

The stock was thereupon offered for sale, and finally sold to the Insurance Company for the sum of Forty-four thousand dollars.

Thereafter, on the same day, the Secretary of the Insurance Company and its attorney, took the said certificates of stock, and the proofs of the regularity of the sale, to the said Bank, and demanded of its President and Cashier that the same be transferred on its books to the Insurance Company, exhibiting the certificates and other papers to the President of the Bank, who declined and refused to make the transfer.

Thereafter a subsequent demand for such transfer was made upon the President of the Bank, the certificates and other papers being presented to him at the time of making such demand, but he again refused to make such transfer.

The said Bank claims to have a lien on said stock by virtue of the statements printed in the body of the stock certificate.

The said Bank never exercised the lien which it claimed to have on the said stock and dividends declared thereon, until after the sale of said stock by the Insurance Company, and its demands for the transfer thereof. *It always paid the dividends declared on said stock to Levi or his estate until July* 1, 1896, *after the sale by the Insurance Company.* The dividends for July, 1896 and January, 1897, it claims to have used in reducing Levi's indebtedness to it.

For other indebtedness owed to it by Levi the said Bank took as security the stock of the Buffalo German Insurance Company and of the German Bank hereinbefore mentioned, and on other notes it had the endorsements of J. H. Tilden and Irlbacker & Davis.

The said Bank had and retained possession of the stock of the Insurance Company and of the German Bank, which it took as security for Levi's indebtedness and finally after this action had been commenced, sold the same; but it never had possession of its stock pledged by Levi to the Insurance Company.

The said Bank claimed a lien on Levi's stock for the sum of about Fifteen thousand, four hundred and thirty-nine and 99-100 dollars, and it estimates the market value of the stock of the Insurance Company and of the Bank which it holds as security at Nine thousand dollars, leaving its unsecured debts from Levi the sum of Six thousand, four hundred and thirty-nine and 99-100 dollars.

The said Bank *never had or claimed actual possession of the stock in question.*

The said Bank never exercised any lien upon the stock or its dividends. It paid dividends during all the time covered by this action aggregating more than twenty thousand dollars, and paid those dividends to Mr. Levi up to July, 1896, when the Insurance Company purchased the stock and made demands for the same. (Record p. 15.)

That during all the times covered by the transactions between Levi and the Bank and the Insurance Company Levi was a Director of the Bank.

POINTS.

I

The bank, Plaintiff in Error, had no lien, actual or constructive, on stock of Levi held by the Insurance Company, defendant in error.

(a) The Bank, Plaintiff in Error, had no authority to make a by-law such as purports to be set out in its stock certificates.

(b) The alleged by-law was unauthorized and void, and created no lien on the stock.

II.

The Bank, Plaintiff in Error had no pledge of the stock.

(a) The Bank, Plaintiff in Error, never had possession of any of the certificates of stock after they were issued to Levi.

(b) The Insurance Company, defendant in error, had possession of each certificate from the time it was pledged to it.

III.

The Bank, Plaintiff in Error, waived any lien on stock by failing to enforce it and by paying profits and dividends thereon to Levi.

(a) The Bank, Plaintiff in Error, has declared dividends semi-annually from May, 1889, to July, 1896, at least six per cent. per annum; these dividends amounting to more than twenty thousand dollars were paid to Levi, while it is now claimed by the Bank it had a lien on the stock of Levi; these dividends amounted to more than three times the unsecured claim of the Bank. Such payment was a waiver of any lien the Bank might have had.

IV.

The Bank's Plaintiff's in Error, proof failed to establish a lien.

(a) It failed to prove that Mr. Levi owed the Bank, plaintiff in error, any sum.

(b) It showed that the indebtedness to the Bank, plaintiff in error, was that of Louis Levi and Rosa Levi.

(c) The executors could not bind the estate.

V.

The Court must differentiate between the class of cases represented by the Lanier, Bullard and Conklin cases and those represented by the Whitney case.

All authorities recognize the two classes of cases as existing, but not as antagonistic in principle. In this case the Court is asked, not to enforce a lien, but to create one in favor of the Bank by construction; the other class of cases are to enforce liens or pledges which the banks actually had.

POINT I.

At the outset of the argument we desire to impress upon the Court the difference that exists between an attempt to set aside or have declared void a lien or security which a National Bank has and which has become an executed contract, and an attempt

to create a lien on an implied executory contract or security when the bank *has none,* and where it admits it has none, in face of a law which says it shall not have such a lien or take such security. The counsel for Plaintiff in Error on this appeal does not cite a number of cases which were deemed to be of importance by him on former appeals, but each case cited involving the rights of a bank is a case of an attempt to invoke a forfeiture of vested rights in the bank in favor of *an individual who was a party to the alleged wrong.* And the Courts held that the government was the only party who could act in the premises to punish the offender for failure to obey the law. The *Thompson* case was a case of over certification of a check by a bank officer. The law itself provided that the check should be good as against the bank in the hands of an innocent holder, but provides a punishment for the officer who shall have certified to the over draft. We shall again call attention to the cases cited by the counsel for the plaintiff in error, but we want to fix the attention of the Court on the fact that the claim of the plaintiff in error herein is entirely different from the claim in any of those cases, is not in conflict with them and is not affected by the questions they decide. The effort of the plaintiff in error in this case *is not to enforce a lien; it is to create a lien.* It comes into court by its counsel, admits that it has no lien, but asks the Court to create an equitable lien for it, and that in face of the direct prohibition of the statute made for the good reason that if stock in a bank is to be taken as security for its loans, there must result an impairment of the assets of the bank.

The Bank, plaintiff in error, is not here asking the Court to enforce a security which it has, *but to create one which it has not.* In every case cited by the counsel where the bank had taken security prohibited by law, *it had the possession of the security.* Nobody else had it. The bank was in actual possession of the security it sought to enforce. It had loaned on the strength of that actual security; it had a lien on the security, *not an implied, but an actual lien, including possession,* and in defending against it rights of third parties were not affected, but it was simply a case of trying to invoke a penalty in favor of an individual, when it was solely the province of the government to inflict the penalty if it saw fit so to do.

The defendant in error became the owner of the stock by its proceedings to sell the same after the default in the payment of the sums for which it was pledged. There was no controversy as to the regularity of the sale of the stock on the trial, and we suppose there can be none here. The defendant in error was, therefore, clearly entitled to a transfer of the stock on the books of the Bank.

But the plaintiff in error claimed that the defendant in error was entitled to have such transfer made when, and only when, it should tender or pay to the Bank the amount of its claim against Levi, for which it had a lien on said stock.

The plaintiff in error never had any lien on said stock or any portion thereof, and it has no claim against Levi.

The plaintiff in error is a banking corporation, organized under the Act of Congress for the incorporation of National Banks. It was organized on the 9th day of January, 1865.

The original Act for the incorporation of National Banks, 12th United States Statutes at Large, page 675, Section 36, provides as follows:

"And it be further enacted, That the capital stock of any Association formed under this act shall be divided into shares of one hundred dollars each, and shall be assignable on the books of the association in such manner as its by-laws shall prescribe; but no shareholder in any association under this act shall have power to sell or transfer any share held in his own right so long as he shall be liable, either as principal debtor, surety or otherwise, to the association for any sum which shall have become due and remain unpaid, *nor in any case shall such shareholder be entitled to receive any dividend, interest or profit on such shares so long as such liabilities shall continue. And all such dividends, interests, and profits shall be retained by the association and applied to the discharge of such liabilities;* and no stock shall be transferred without the consent of a majority of the directors while the holder thereof is thus indebted to the association."

The entire Act of 1863 was repealed by Section 62 of the Act of 1864.

See United States Statutes at Large, Vol. 13, p. 118.

This Act of 1864, being Chapter 106 of the first session of the Thirty-eight Congress, is the law under which the Third National Bank was organized. Section 35 of said Act prohibits any association formed under said Act from making loans on security of its own stock. It is as follows:

> "And it be further enacted, that no association shall make any loan or discount on the security of the shares of its own capital stock, nor be the purchaser or holder of any such shares, unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith; and stock so purchased or acquired shall, within six months —from the time of its purchase, be sold or disposed of at public or private sale, in default of which a receiver may be appointed to close up the business of the association, according to the provisions of this Act."

The same provision is in Section 5201 of the second edition of the Revised Statutes of the United States.

In the Act of 1864, Section 36 of the Act of 1863 was not re-enacted. Its provisions were plainly in conflict with the provisions of 5201 above quoted, and it is plain that the omission was intentional and for the very purpose of making the provisions of 5201 more effective.

Section 15 of the by-laws of the Bank, the plaintiff in error, might have been justified, although not necessary under the Act of 1863, but after the repeal of the Act it was entirely unauthorized. Subdivision 6 of Section 5136 of the Revised Statutes provides that National Banks shall have power to prescribe by its board of directors, by-laws *not inconsistent* with law, regulating the manner in which its stock shall be transferred, its directors elected or appointed, its officers appointed, its property transferred, its general business conducted and the privileges granted to it by law exercised and enjoyed.

There is no authority in the law for the enactment of a by-law containing the provisions of Section 15 in this Bank's by-laws, and there is, as we have said, an express provision prohibiting any such by-law in the Act of Congress which prohibits the Bank

from loaning on the security of its own stock. The provisions of Section 15 of this Bank's by-laws *are inconsistent with law* and are therefore void.

This question has been fully decided in the United States Supreme Court, first in the case of the Bank vs. Lanier, 11 Wallace, 369-378, and afterwards in Bullard vs. National Eagle Bank, 18 Wallace, 589-598.

Under these decisions it is plain that the language contained in the 15th section of this Bank's by-laws, intending to give the bank a lien upon the stock of its debtor stockholder, is unauthorized and void. They hold that "a National Bank organized under the National Banking Act of 1864, cannot even by provisions framed with a direct view to that effect in its Articles of Association, acquire a lien on its own stock held by persons who are its debtors." The same doctrine is fully set forth in the Second National Bank of Louisville vs. National and State Bank of New York, 10 Bush, (Kentucky) 367-375.

The statement contained in the certificate of stock, of the plaintiff in error, that the indebtedness of the stockholders should be a lien upon the stock, does not affect the right of the Insurance Company, the defendant in error. In the case of Conklin vs. The Second National Bank of Oswego, 45 N. Y., 655, it is held that while a certificate of stock in a National Bank contained a provision that the stock was not transferable until all the liabilities of the stockholders of the bank were paid, that such an agreement gave the bank no lien upon the stock, and was void as prohibited by the Act of Congress of 1864.

13 *United States Statutes, p.* 99.

In this case Justice Grover goes into the argument with great force and clearness, and shows that there is no power to enact such a by-law, and that there is no law authorizing the insertion of such power of the directors in the Articles of Association.

And in the case of Driscoll vs. The West Bradley & C. M. Co., 59 N. Y., 96, Judge Folger, in writing the opinion, shows that in order to make the provisions of the Articles of Association or by-laws of a corporation binding, there must be authority in the act creating the corporation for such by-law.

The decisions above cited show that the Act of 1864 contained no such authority and did contain a specific prohibition against any such action, and as Judge FOLGER says at page 102, "The judgment in this case may be put upon the absence of power in the defendant to make the by-law under which it asserts a lien."

The principle that we contend for was squarely held in Evansville National Bank vs. Metropolitan National Bank, Circuit Court, Indiana, May Term, 1871, reported in 2 Bissell's Reports, page 527. The case is squarely on all fours with the case at bar.

This case was appealed to the Supreme Court, and affirmed.

As it is short, we give it practically in full.

"Appeal from District Court.

This was an action by the Evansville National Bank, of Evansville, Indiana, to recover two hundred shares of its capital stock, pledged to the Metropolitan National Bank of New York City.

The Evansville National Bank was organized in January, 1865, under the Act of Congress, of June 3, 1864. One of the articles of association provided that the directors might prohibit the transfer of stock without their consent. Accordingly a by-law declared that no transfer of the stock should be made without the consent of the Board of Directors, by any shareholder who was indebted to the bank and certificates of stock were to contain this provision. After the adoption of this by-law, Watts, Crane & Co., became the owners of one hundred and fifty shares of stock, and Crane, one of the firm, of fifty shares. Certificates were issued for these shares in conformity with the above by-law.

Watts, Crane & Co., did business with the Evansville National Bank, and they were indebted to the bank from the time they became holders of the stock, for money loaned upon bills drawn, indorsed, or accepted by them, in the usual course of dealing.

On the 15th of September, 1866, they borrowed $30,000 of the Metropolitan National Bank, of New York, and they and Crane delivered their certificates of stock as a pledge to secure

the money so borrowed, attaching to the certificates bills of sale with power of attorney for the transfer of the stock.

On the 15th of April, 1867, Watts, Crane & Co., became indebted to the Evansville National Bank, on an acceptance for $25,000. At this time the Evansville Bank had no notice of the pledge previously made to the Metropolitan Bank. The members of the firm of Watts, Crane & Co., were declared bankrupts by the District Court of Indiana, March 3, 1868.

The District Court held that the pledge to the Metropolitan Bank was binding, notwithstanding the by-laws under which the Evansville Bank claimed a lien upon the stock.

Drummond, J. The only question in the case is, whether this by-law was valid under the law of June 3, 1864. The 8th section of that act authorizes the Board of Directors to make by-laws, but declares they must not be inconsistent with its provisions.

The 35th section declares that no association shall make any loans, or discount on the security of the shares of its own capital stock, nor be the purchaser or holder of any such shares, unless to prevent loss on a debt previously contracted in good faith.

The counsel for the plaintiff, in the able argument he has presented, claims that the operation of the by-law upon the shares of stock, because of the indebtedness of Watts, Crane & Co., and their transfer to the Metropolitan Bank, without the consent of the Board of Directors, was not a loan or discount made on the security of the shares, that there must be a distinct assignment or hypothecation of the stock as security for a loan or discount made, and some authorities have been cited which seem to sustain that principle. But if a by-law declares in substance and effect, that for all loans or discounts made to the shareholder, a lien shall exist against his stock, the result would be the same as if there were a separate transaction and security given in each case. The shareholder always has the credit on the security of his stock, and thus the very object is accomplished which the 35th section sought to prevent, the absorption of the shares into the assets of the bank. And it will be observed that the law only allows the stock to be taken by the bank as security, or purchased or held to avoid loss on a debt previously contracted in good

faith, and even then the stock is to be retained by the bank only a limited time.

An extended examination of the authorities cited by counsel is unnecessary, because in the case of the First National Bank of South Bend vs. Lanier, recently decided by the Supreme Court of the United States, the question involved here is discussed by that Court and a principle established that is decisive of this case.

In that case the bank had made a by-law, declaring that the stock of the bank should be transferable only on its books subject to the provisions of the 36th section of the Act of 1863 (by which a shareholder was prevented from transferring his stock when he owed the bank). The bank sought to avail itself of this by-law, notwithstanding the repeal of the 36th section, by the Act of 1864, and the Court held that that could not be done. This was in effect, deciding that no such by-law could be in force under the provisions of the Act of 1864. The language of the Court is: "Congress evidently intended, by leaving out of the law of "1864 the 36th section of the Act of 1863, to relieve the holders "of bank shares from the restrictions imposed by that section. "The policy on the subject was changed, and the directors of "banking associations were in effect notified, that thereafter "they must deal with their shareholders as they dealt with other "people. As the restrictions fell, so did that part of the by-law "relating to the subject fall with them."

The decree of the District Court is affirmed.

The case of Feekheimer vs. The National Exchange Bank of Norfolk, Va., is so completely like the case at bar that we give it in full.

Feekheimer v. The National Exchange Bank of Norfolk, Va., 79 Va., 80.

Appeal from decree of Corporation Court of City of Norfolk, rendered 24th June, 1882, in the chancery cause wherein Martin S. Feekheimer is plaintiff and the National Exchange Bank of the City of Norfolk is defendant.

On 8th May, 1866, the firm of Lublin & Steiner, doing business in Norfolk and elsewhere, failing, conveyed by deed all

their property, real and personal, to said Feckheimer as trustee to secure certain debts, and to do whatever was necessary to effect the objects of the trust. Lublin & Steiner owned twenty shares of the stock of said bank, worth $100 a share. Trustee applied to the bank to transfer the shares to him, offering to surrender the old certificates upon the Bank's issuing new ones to him. The Bank refused on the ground that, by its by-laws no stock can be transferred by any stockholder who is liable to the Bank either as principal or debtor or otherwise, *which provision is endorsed on the certificates when issued*, and that Lublin & Steiner owed the Bank about $6,000. The object of this suit was to compel the Bank to transfer on its books the twenty shares to the trustee, and to issue to him new certificates therefor to be applied according to the provisions of the trust deed. At the hearing of the cause, the Corporation Court, considering that the plaintiff Feckheimer, had not made a case meet for the specific relief asked for in his bill, refused to compel the defendant Bank to allow the transfer on its books of the twenty shares of stock to the plaintiff, and dismissed his bill, and the latter appealed to this Court.

Harrwanson & Heath and Sharp & Hughes, for the appellant.

Wm. H. C. Ellis, for the appellee.

Lacy, J., delivered the opinion of the Court.

In the argument here the counsel for the appellee insists that the Bank was entitled to hold the stock and to refuse its transfer until its debts due by the firm of Lublin & Steiner had been paid and satisfied; and further, that however that might be, there was no jurisdiction in equity in the case, that the remedy of the plaintiff was adequate at law, etc.

The first proposition has been well settled by recent decisions of the Supreme Court of the United States. The 36th section of the National Banking Act, approved June 3d, 1864, (Section 5201, U. S. Rev. Stat.), under which act the said bank was organized, provides "That no association shall make any loan or discount on the security of the shares of its own capital stock; nor be the purchaser or holder of any such stock, unless such security or purchase shall be necessary to prevent loss on a debt previously contracted in good faith, and stock so purchased or

acquired shall, within six months from the time of its purchase, be sold or disposed of at public or private sale; in default thereof a receiver may be appointed to close up the business of the association according to the provisions of the Act." In passing upon this question and construing this section, the Supreme Court of the United States held in a recent case that these associations are expressly prohibited from making any loan or discount on the security of the shares of their own capital stock. And so marked is the policy of Congress on this subject that it does not allow a bank to become the purchaser or holder of its shares at all, unless absolutely necessary to prevent loss on a debt previously contracted in good faith, and not then for a longer period than six months. It is easy to see, that if the power were given to loan money on the security of its shares, it would imply also the power to become the owner of those shares, and this Congress intended to guard against. These institutions were created to subserve public purposes, and not the mere private interests of the stockholders. And in no better way could this object be attained than in placing shareholders in their pecuniary dealings with the bank on the same footing with other customers.

Whatever may have been the reason which induced the action of Congress in providing thus, the provision is plain and unambiguous, in the law, and binding on all associations organized thereunder.

The stock cannot be pledged at the time of the loan; the bank can acquire no lien upon it by express agreement at the time of the loan, nor can the bank so enact in its by-laws as to make it liable for a debt due the bank.

In this case the stock was never pledged by the debtors in question, but the certificates of stock containing on their face a provision that if the holder be liable to the bank, either as principal or otherwise, the consent of the Board of Directors should first be obtained before the transfer could be made. The bank relied upon this stipulation taken from their by-laws to enable it to subject the stock to its debt, but the provision contained in the by-laws is in contravention of the laws of Congress and is therefore void, and so far as it may apply an express agreement between the bank and its shareholder, to that effect, it is void, as

against public policy, and in its inception was a violation of law. As was held by the Supreme Court of the United States in Bank v. Lanier, 11 Wall., 369; see also Bullard v. Bank, 18 Wall., 589.

"The Court erred in its decree dismissing the bill of the plaintiffs, and the same must be reversed and annulled.

Decree reversed."

If the plaintiff in error had any lien on this stock it has held the same longer than the law allows, to-wit, six months. Section 5201 U. S. Rev. Statutes.

In Continental National Bank vs. Ellicott National Bank, Circuit Court, District Mass., April, 1884, reported in 7 Federal Reports, page 376, the Court cites the Lanier and Bullard cases and says: "The Bullard case decides that certificates of shares in National Banks are so far negotiable, or quasi-negotiable, that a by-law of the bank which undertakes to make them subject to the debt of the transferrer to the bank itself, is void."

The same doctrine is held in Orleans National Banking Association vs. S. Wilts & Company, 10 Federal Reports page 330.

All of the text writers in their late editions recognize the contention which we make, as the law. Cook on Stockholders, 3d edition, 1894, Section 533, says, "National Banks were formerly held to have power to enact by-laws, creating a lien on stock in the bank for debts owed by its owners to the bank, but the Supreme Court of the United States, when the question came before it, refused to enforce such a by-law and decided that its enactment was not within the spirit of those provisions of the Act of 1864, which conferred power upon the management of a National Bank to regulate the business of the bank and conduct its affairs."

In the present state of the law no National Bank can by any by-law create any lien upon shares of stock of the bank to secure the payment of any indebtedness which the owners of the shares may contract with the bank. This conclusion is in accordance with the well settled policy of the Federal Courts to protect purchasers of certificates of stock from all secret liens.

Jones on Liens, (1891) 2nd Ed., Sec. 384, says: "Under

the National Banking Act of 1864, a bank cannot have a lien on its own stock held by a debtor, although its Articles of Association and its by-laws are framed with a direct view to giving it such a lien; for, aside from the fact that the Act of the preceding year contained an express provision for such a lien, which was omitted in the substituted Act of 1864, it was considered that such a lien would be inconsistent with the general policy of the act which prohibits loans upon the security of shares of its own capital stock."

Thompson's Commentary on the Law of Corporations, Vol. 2, Sec. 2319, 1894 ed., says: "It has been held that National Banks organized under the National Banking Act of 1864, have no liens on the shares of their stockholders for indebtedness due from them; and that provisions framed with a direct view to that effect, in the Articles of Association of such a bank, and by-laws in pursuance thereof, are void as being incompatible with the prohibition of loans and discounts by any bank on the security of the shares of its own capital stock, and also with the repeal by that act of the provisions in the Act of 1863, that no shareholder shall have power to transfer or sell his shares, so long as he is liable for any debt due to the bank."

The American and English Enc. of Law, Vol. 16, page 201 Section 14, says: "The National Banking Act imposed special restrictions upon National Banks in regard to making loans upon the security of shares of their own stock, or purchasing such stock, and it is generally held that the by-laws of the bank cannot be so worded as to contravene such prohibition."

Sec. 15. "A National Bank cannot, according to what seems to be the present preponderating doctrine, even by provisions framed with a direct view to that effect in its Articles of Association and by-laws, acquire a lien on its own stock held by persons who are its debtors."

The same thing is in Boone on the Law of Banks, Section 236.

Paine's Banking Laws, page 533, says: "A National Bank organized and controlled by the Act of 1864, cannot acquire a valid lien upon its shareholders by the Articles of Association or by-laws, citing.

Buffalo vs. Bank, 18 *Wallace*, 597.
Bank vs. Lanier, 11 *Wallace*, *p.* 369.
Johnson vs. Lang, 103 *U. S.* 803.
Sargent vs. Franklin Ins. Co., 8 *Pick.*, 90, 96-7.
Bundu vs. Jackson, 24 *Fed. Rep.*, 628, 630.
Johnson vs. Laflin, 5 *Dillon*, 65, 73, 74.
D. L. & W. R. R. Co. vs. Oxford Iron Co., 38 *N. J. Eq.*, 340.
Feckheimer, vs. Nat. Exch. Bank, 79 *Va.*, 80.

All the authorities hold that in order to create a lien, the authority must be contained in the statute creating the corporation, or in the Articles of Association.

The creating of a lien is an extraordinary power, and the authority to create such lien must be clear. Findings XIII and XIV, Folios 22-23 are of no avail to the plaintiff in error as its articles of association and by-laws therein quoted are unauthorized. The Comptroller of the Currency at Washington had no more power to vitalize the by-laws and Articles of Association of the defendant than had the Comptroller of the Currency at Pekin.

Shares in the capital stock of associations, under the National Banking Law, are salable and transferable at the will of the owner. They are, in that respect, like other personal property. The statute recognizes this transferability, although it authorizes every association to prescribe the manner of their transfer. Its power in that respect, however, can only go to the extent of prescribing conditions essential to the protection of the association against fraudulent transfers or such as may be designed to evade the just responsibility of the stockholder. It is to be exercised reasonably. Under the pretense of prescribing the manner of the transfer, the association cannot clog the transfer with useless restrictions or make it dependent upon the consent of the directors or other stockholders. It is not necessary, however, to consider what restrictions would be within its power, for it had imposed none. As between Laflin and the broker, the transaction was consummated when the certificate was delivered to the latter, with the blank power of attorney indorsed, and the money was received from him. As between them, the title to the

shares then passed; whether that be deemed a legal or equitable one matters not; the right to the shares then vested in the purchaser. The entry of the transaction on the books of the bank, where stock is sold, is required, not for the translation of the title, but for the protection of the parties and others dealing with the bank, and to enable it to know who are its stockholders, entitled to vote at their meetings and receive dividends when declared. It is necessary to protect the seller against subsequent liability as a stockholder, and perhaps also to protect the purchaser against proceedings of the seller's creditors. Purchasers and creditors in the absence of other knowledge, are only bound to look at the books of registry of the bank. But as between the parties to a sale, it is enough that the certificate is delivered with authority to the purchaser, or anyone he may name, to transfer it on the books of the company, and the price is paid. If a subsequent transfer of the certificate be refused by the bank it can be compelled, at the instance of either of them.

Johnston vs. Laflin, 103 U. S. 532, *s. c.* 5 *Dillon*, 65 and cases there cited. (Opinion Justice Field.)

The restrictions in the certificate, therefore, gave the bank no lien upon the stock.

POINT II.

The Bank, the plaintiff in error, had no Pledge of the stock.

The Bank had no actual pledge of the stock in suit as collateral for any indebtedness which Levi might have owed it. It never had possession of the stock in question; the stock was issued July 2, 1888, and given to Mr. Levi, and never returned to the Bank or placed under his control, or in any way shown to the Bank until it was taken to the Bank by the officers of the Insurance Company for the purpose of having it transferred on the books of the Bank.

It is a well settled principle at law that to make a valid pledge, there must be delivery, actual or constructive of the pledge by the pledgor or his agent, in the possesssion of the pledgee or his agent, in order to pass any right of property in the thing

pledged. To keep the pledge good, the property pledged must remain in the possession or under the control of the pledgee.

Cortelyn vs. Lansing, 2 *Cai. Cas.* 200, 202.
Garlick vs. James, 12 *Johns.*, 146.
Wilson vs. Little, 2 *Const.*, 443.
18 *Am. & Eng. Enc. of Law*, 595-598.

"A pledgee can only retain his lien by retaining possession. When he delivers up possession, his lien ceases."

Black vs. Bogart, 65 *N. Y.*, 601.

"The pledgor's possession of the pledge is prima facie evidence of fraud."

McComber vs. Parker, 14 *Pickering*, 497.

It is conceded that the Bank never had actual possession of the stock, and the only claim that it makes to any possession is found in the XV. Finding of Fact (Fol. 23,) which is based on the testimony of Mr. Sweet, President of the Bank, plaintiff in error, given on the first trial, and on the re-trial read from the Stenographer's minutes of the first trial, and recited in the statement of the case in the decision of the Court of Appeals 162 N. Y., 165.

This attempt to establish a lien by a verbal agreement between the president of the plaintiff in error and Levi is not new. It was attempted in the case of the D. L. & W. R. R. Co. vs. The Oxford Iron Company, 38 N. J. Eq., 340, where the cashier of a National Bank swore to an arrangement similar to that which Mr. Sweet swears to in this case, but the Court held that the verbal agreement supplemented by a by-law similar to the one in this case did not give the National Bank a lien on its stock.

The Bank's counsel, in his brief on the appeal to the Court of Appeals, we think, showed that the plaintiff in error never had a lien, and never intended to have a lien, on the stock for the money Levi borrowed from it. In one place he said: "It is true that the amendment of the Act of 1863 by the Act of 1864 indicates that Congress did not intend that banks should loan money upon the security of their own stock."

In another place he asked: "Is there anything in this case to show that the bank intended to claim or assert the lien when

the money was first loaned? True, the stock provided for such a lien, but the bank could waive it, and could treat the provision as one for its benefit, to be asserted only in case to prevent loss."

It is a little difficult to say, in view of these statements, how this subsequent claim of a lien could be anything but a lien for future indebtedness if, as the counsel admitted, it was not intended as security for the previous indebtedness contracted in good faith.

On another page he said: "So, too, the defendant (Bank) by paying dividends to the Levis, waived its equitable lien thereon. By not taking a formal transfer of the stock to itself, the defendant Bank never acquired a complete legal lien upon the stock of Levi. The only lien it had upon the stock of Levi was an equitable lien. The by-law and the stock itself, and the arrangement made with Levvi when the loan was made, together give the defendant an equitable lien upon the stock."

And again he said: "The debt of Levi was contracted to the Bank in good faith, and the loan to Levi was made by the Bank in good faith. *Because Levi was good at the time, the Bank was satisfied with a mere equitable claim upon the stock;* a claim and lien which it could undoubtedly enforce as against Levi and his estate. Although the Bank left the stock in Levi's hands because to take it from him would be a violation of the law, it did so knowing he could do no harm with it because the stock itself contained notice of any claim or demand the defendant might have against a stockholder."

Now we have the Bank's counsel admitting that the Act of Congress did not intend that banks should loan upon security of their own stock; asking if there is anything in the evidence to show that the bank intended to claim or assert a lien when the money was first loaned; stating that the Bank by paying dividends to the Levis, waived its equitable lien thereon, and stating that by not taking a formal transfer of the stock to itself, the Bank never acquired a complete legal lien upon the stock of Levi, and further stating that the loan by the bank to Levi was not made upon the faith of the stock, but was made because Levi was known to be good, and then asserting that the bank under

all these conditions is entitled to a equitable lien as against the Insurance Company.

Still further the counsel said "Had the defendant (Bank) said to Levi that it would loan him the money if he would assign his stock to it as security therefor, the statute would have been violated," and following he said: "As Levi did not assign his stock to the defendant (Bank), the statute was not violated by this transaction. The defendant (Bank) was loaning upon the personal security of Levi."

Can it be possible that a Court will create an equitable lien in the face of a statute positively prohibiting any lien, and in the face of an admission that such a lien, if it had been provided for in direct terms, would not have been legal, and in face of the fact that it is admitted that no lien was intended, and that it is admitted further that if any lien existed, it has been waived in part? This is what the counsel for the plaintiff in error asks the Court to do.

POINT III.

If the plaintiff in error ever had any lien upon the stock in question, either actual or constructive, it waived that lien by a failure to enforce it.

The plaintiff in error has been paying dividends on this stock all this time; Mr. Levi has drawn all the dividends on his stock up to the time of the demand by the defendant in error. From May 25, 1899, to July, 1896, would be over seven years. The plaintiff in error had declared dividends right along, and no dividend was less than six per cent. per annum; most of them had been more than that, but take it at six per cent. for seven years, the dividends would have amounted to forty-two per cent. on the stock in question, the par value of which was $15,000. Forty-two per cent. on that sum would have been $18,900.00, so that during the time that the plaintiff in error now claims it had a lien on this stock, it had paid to Levi $18,900, or more than three times the amount of its unsecured indebtedness.

Now the certificate of stock purporting to recite the by-law

under which plaintiff in error claims a lien, says that all sums for which the holder thereof shall be liable to the Association, either as principal debtor or otherwise, shall be a lien upon the said stock and *all profits thereof and dividends.*

Mr. Moot, the Counsel for the Bank, in his argument on the former appeal said: "So, too, the defendant, by paying the dividend to Levi, waives its equitable lien thereon." That was the only lien he claimed to have. So the whole lien was waived, and we say the equitable lien, if any, on the whole was waived, for the stock and the dividends were pledged, if at all, together.

If it had a lien at all, it had its lien upon the profits and dividends as well as the stock. (By-Laws, Sec. 15, p. 13, following Sec. 13, Act 1863, U. S. Stat. at Large, p. 675.) If it saw fit to pay the profits and dividends of Levi, we submit that it cannot now insist upon its lien upon the stock alone as against the Insurance Company. The taking of other security by the Bank for its debt from Levi, was a waiver of any lien, implied or otherwise.

The bank had other collateral, in the shape of stock in the Insurance Company and stock in the German Bank, of the value of about $9,000. And it appears from finding of fact No. XVII that the bank did take from Levi as security stock in the Insurance Company and in the German Bank, and the value of said security was $9,000, and that it also took as security from Levi the endorsement of J. H. Tilden and Irlbacker & Davis, both of whom were responsible.

The taking of such security under the law was a waiver of any lien that it had, or could have by implication on its stock.

Barrett vs. Goddard, 3 *Mason*, 107.
Gilman vs. Brown, 1 *Mason*, 191.
Same case, 4 *Wheat.*, 255.

POINT IV.

Levi's debt to the bank was fully paid.

The plaintiff in error has failed to show that there was any indebtedness due from Levi to it for which it could claim a lien.

Emanuel Levi the original owner of the stock died June 21,

1893, and Rosa Levi and Louis E. Levi were duly appointed executors of his estate. (Finding of Fact No. VI.) The stock was sold to the defendant in error June 30, 1896. (Finding of Fact IX.)

The indebtedness which the bank had from Levi is set forth in finding of fact XVI.

It therefore appears that Emanuel Levi owed the Bank nothing. His notes had all been retired and the Bank held notes made payable to the order of Louis E. Levi signed by

"LOUIS E. LEVI, Ex.
"ROSA LEVI, Ex."

And endorsed

"LOUIS E. LEVI,"
"ROSA LEVI."

There is no mention of Emanuel Levi, or the estate of Emanuel Levi, in the notes held by the Bank, or in the evidence of the indebtedness for which the Bank claimed to have a lien on Emanuel Levi's steel. (Finding of Fact XVI.)

If Louis Levi and Rosa Levi, his executors, borrowed money of the Bank, for which they gave their notes, the Bank could therefore acquire a lien on the stock which belonged to the estate of Emanuel Levi.

There is no proposition of law better settled than that personal representatives may bind themselves, but that they cannot, even by special contract for the benefit of the estate, bind the estate or create a lien on the estate. This doctrine is laid down by the Court of Appeals in Austin vs. Monroe, 47 N. Y., 360, and has been followed ever since without change.

All of the paper now held by the Bank, and for which it claims to hold the stock as security, is the paper of Rosa Levi and Louis Levi and, therefore, cannot be secured by any alleged lien on this stock.

POINT V.

The decision reached by the Court of Appeals (162 N. Y., page 168) in which Mr. Justice GRAY wrote the opinion, should

stand. Every point raised by the counsel on either side was fully considered in the opinion of the Court by Mr. Justice GRAY, and we have not undertaken in the argument of this case to add anything to what Mr. Justice GRAY said, or to the reasons that he then advanced for the decision of the Court.

In the argument of this case in the Court of Appeals counsel for the Bank quoted the 35th Section of the Banking Act to the effect that "No association shall make any loan or discount on the security of the shares of its own capital stock nor be the purchaser or holder of any such shares *unless such security or purchase shall be necessary to prevent a loss upon a debt previously contracted in good faith.*"

In the opening paragraph of this Point he states that Levi made a contract with the bank for a lien on his stock in the bank in case he should decide to become a borrower; that thereafter he did become a borrower to the extent of Thirty-one thousand dollars; and that for that amount the bank had a lien on his stock. It is difficult to see how from such a statement the counsel can claim that the lien which he seeks to enforce in favor of the bank was for a past indebtedness, or was secured to prevent a loss upon a debt previously contracted, because he says that Levi did not become a borrower until after he had made the contract with the bank that the bank should have a lien.

Defendant's counsel then proceeded further in his Points to assert than after the Thirty-one thousand dollars had been borrowed by Levi he desired to obtain a further amount and so reaffirmed his understanding that the lien contracted for his past due indebtedness should be extended and a new loan of Twelve thousand dollars made upon the strength of his re-affirmation and verbal pledge of the stock. He requested the Court to find that the making of that new loan was partly upon the faith of a verbal pledge of this stock as security for the new loan, although he admits the stock was not present or in any manner delivered as security for the pretended lien. The finding of the Court is (record, p. 13) "That on the 1st day of October, 1890, the said Emanuel Levi was indebted to the defendant in the sum of Thirty-one thousand dollars, which had existed, in whole or in part, since May 1st, 1890, and *as security for the payment there-*

of, the said defendant held promissory notes of the said Emanuel Levi. That upon the first day of October, 1890, the said Emanuel Levi applied for a further loan of Twelve thousand dollars, and proposed *to secure the same by note made by himself and endorsed by his son Louis Levi,* and to treat and consider as delivered to the defendant the stock which he owned in the defendant corporation, and which was then in the safe deposit vaults of the Buffalo Loan & Trust Company as security for the payment of the said indebtedness of Thirty-one thousand dollars, and the loan that day made; and that thereupon, and in reliance upon such further and additional security for the payment of the indebtedness and the endorsement of the paper of the said Emanuel Levi of Twelve thousand dollars by his son, Louis Levi, the said defendant made the said loan of Twelve thousand dollars, and extended the time of payment of the Thirty-one thousand dollars old indebtedness."

So that if it is of any moment at all the counsel has proven by his argument in his first Point that the lien he claims, if created at all, was not created to secure a past due indebtedness, but was created to secure future advances; if it was created, by the words in the by-laws and printed on the certificate, it was to secure future advances, which he claimed had amounted to Thirty-one thousand dollars; and if it was created by the verbal pledge, it was created to secure the future advance of Twelve thousand dollars, on the additional security, of course, of the endorsements therein mentioned.

On this appeal the counsel for the appellant has seen fit to eliminate all the evidence, even the evidence upon which he bases the finding of the indebtedness of Levi to the Bank of Thirty-one thousand dollars, and the evidence of the alleged verbal pledge or the "re-affirming of the lien," as he calls it, for the Twelve thousand dollar loan.

There is perhaps a reason for this omission contained in the last paragraph of the fourth page of the brief of the plaintiff in error.

It is not a fact however that the trial judge has found the fact quite fully and more favorably to the Bank than on the former

trial. The Court of Appeals on the second argument so held and we have shown in this brief at page 2 all the changes made in the findings except the conclusions of law which were in favor of the Insurance Company instead of the Bank.

In the statement of the case contained in the report of the case 162 N. Y., at the bottom of page 165, is the following statement: "It is also claimed that he orally stated to the defendant's president that he had a large amount of stock in the bank and that was security for his loans, and that though it was in the safe deposit vault the bank could consider it there as delivered as collateral to its loan. The Trial Court made no findings as to these facts; nor otherwise upon the subject in the finding above given." This language is no part of the opinion of the Court, but on the re-trial of the case the counsel read from the testimony on the former trial the testimony of Mr. Sweet on this point, and on that testimony, which was uncontradicted, asked the Court to make the finding which it did make. The evidence upon which the finding was made was all before the Court of Appeals on the first argument in exactly the same shape it was in before the Trial Judge on the re-trial.

There should be no force given to this finding which was not given to the evidence itself on the former appeal, and which was exactly the same, and uncontradicted.

The counsel for the plaintiff in error in his first point says the justice of the Bank's claim is clear, and cites from the Fourteenth Finding, page 13, the by-law giving it a lien upon the stock and all profits therefor. It never undertook to enforce this lien, because from the time the stock was issued to Mr. Levi in 1888 down to the time when the Insurance Company purchased the stock, July 1, 1896, the Bank had paid all the profits and dividends on said stock to Levi or his estate (Folio 26, page 15).

The lien, if any, which the Bank could claim, was a lien *upon the stock, its profits and dividends, and the payment by the Bank of the profits and dividends to Levi* during all this time was certainly a waiver of any possible claim the Bank might have had (105 U. S. 221).

Levi during all these times up to the date of his death was a Director in the Bank.

The counsel says in his brief (p. 30), "As the Insurance Company is sure of the stock in any event, why should the Bank not be permitted to retain dividends enough to pay it, in exact accordance with the agreement of Levi, and with the understanding evidenced by the certificate of stock itself?" The answer is clear and simple. First—It has no right to retain such dividends; and Second—If it had such a right, it voluntarily refused to exercise it, and voluntarily paid its dividends to Levi in a sum far greater than the amount of its alleged indebtedness. All the while that it claimed to have a lien on this stock and its profits and dividends, it was voluntarily paying those profits and dividends to Levi, and, as we have said, the amount thus voluntarily paid more than trebled the amount for which it now claims it has a lien on said stock.

The counsel for the plaintiff in error cites at great length the case of Knight vs. the Old National Bank, decided in Rhode Island District, June Term, 1871, by Mr. Justice CLIFFORD, (3 Cliff. 429,) but he does not cite from the opinion of the Justice, page 435 and page 436,—holding that there must be express authority for the enactment of such a by-law contained in the charter of the Bank, or in the Act under which it was created. The doctrine of the Knight case is expressly disapproved by this Court in Johnston vs. Laflin, 103 U. S. 534. See opinion of Justice FIELD therein herein before quoted.

In Knight vs. The Bank, the by-law did not contain any such provision as the by-laws of the plaintiff in error contain: "Which liability shall be a lien upon the said stock and all profits thereof and dividends." (Page 11.) The Bank's refusal to transfer the stock was solely upon the ground that Levi was indebted to it and that by reason of the by-law and the notice on the certificates of stock it had a lien on the stock for the amount of Levi's indebtedness and that when that was paid it would transfer the stock. In the answer to the original complaint in this action, (p. 8, Fol. 13,) the Bank alleges that at the time of the sale of Levi's stock to the Insurance Company Levi was indebted to the Bank in a large sum of money; that the sum of sixteen

thousand three hundred and fifty-seven and 99-100 dollars ($16,357.99) and interest from the 27th of August, 1896, was still due to it; that the Bank had a lien on all of Levi's stock to that amount, and (p. 9, Fol. 14) that plaintiff's (the Insurance Companny's) lien, if any, is inferior and subsequent to the claim or lien of the defendant (the Bank).

The decision of the Supreme Court on the first trial was in favor of the Bank, and the conclusion reached upon the facts was in substance that the defendant Bank had a lien upon the stock for the amount of the indebtedness existing against the estate of Levi when the certificates were purchased by the Insurance Company, and that the latter's right to a transfer to itself of the stock was subject to the lien of the Bank, and the judgment was that the plaintiff was entitled to a transfer of the stock in question by the Bank and to have new certificates issued to it in place of those to be surrendered and cancelled, when, but not until plaintiff (the Insurance Company) should pay to the Bank an amount sufficient to satisfy its lien for the indebtedess to it owing by Levi's estate. Buffalo German Insurance Company vs. Third National Bank, 162 N. Y., p. 166. The only question in the pleadings, on the trial, and in the decisions is whether the Bank had a lien on Levi's stock for the amount of his indebtedess to the Bank. The refusal of the Courts below to allow the lien of the Bank upon the stock for the amount of its advances is asserted by Counsel for plaintiff in error (p. 6 of his brief), to be the essence of the fifth, sixth, seventh, and eighth assignments of error.

It is the concluding cry of counsel for plaintiff in error set out on page 30 of his brief: "As the Insurance Company is sure of the stock in any event, why should the Bank not be permitted to retain dividends enough to pay it, in exact accordance with the agreement of Levi, and with the understanding evidenced by the certificate of stock itself?" The case of Knight vs. Old National Bank, 3 Cliff., 429, is not in point.

The counsel also cites Brent vs. Bank of Washington, 10 Peters, 615. This case arose under facts which occurred in 1820, and under the provisions of the Act of 1797, which permitted such by-laws to be made, as did the Act of 1863; but the

force of these decisions dies with the repeal of those Acts and the enactment of 1864 and the amendments thereof. This case had no bearing whatever in the case at Bar.

On page 4 the Counsel for plaintiff in error recites the fact that Levi had transferred to the Insurance Company all of the certificates mentioned, with an assignment and receipt as *Collateral Security*, and says that they were not then in fact *transferred on the books of the Bank*, and says the contrary is found; and then recites the 18th Finding of fact,—that plaintiff did not at any time until June 30, 1896, demand a transfer of said stock or the payment to it of any dividend thereon. The stock being assigned to the Insurance Company as *collateral to its loan*, it could not have the same transferred on the books of the Bank until some default had been made and the collateral had become by a legal process the property of the Insurance Company. There was no default, and therefore no right of the Bank to transfer until after the default which gave rise to the sale of June 30, 1896, on which sale the Insurance Company became the purchaser of the stock. It then demanded a transfer, producing proofs of the sale and its title to the stock, and demanded that dividends should be paid to it thereafter.

The counsel for the plaintiff in error relies on the cases of National Bank vs. Matthews, 98 U. S. 621, and s. c. 8 Otto, 621-630, and National Bank vs. Whitney, 103 U. S. 99, and s. c. 13 Otto, 99-104, to overcome the case of Bullard vs. Bank, 18 Wall. 594, and Bank vs. Lanier, 11 Wall. 369. Mr. Justice Gray writing the opinion of the Court of Appeals in Buffalo German Insurance Company vs. Third National Bank, 162 N. Y., page 163-171, etc., differentiates between these two classes of cases and shows that they are not at all in conflict; that they arise on entirely different conditions and decide very distinct propositions of law. While we regard all these cases as good law, Mr. Justice Miller dissented in the Matthews case, and Justices Miller and Harlan dissented in the Whitney case. The strongest confirmation that this class of cases are not antagonistic is found in the fact that nowhere in the briefs of counsel or opinions of the Court in the Matthews or Whitney cases are the Bullard or Lanier cases, or either of them, cited or referred to.

The Insurance Company, in asking this Court to affirm the judgment of the Court of Appeals of the State of New York, is simply asking it to affirm its own decisions in the Bullard and Lanier cases, which have stood without question ever since they were rendered, have been cited, approved and followed in the United States Courts, in the Courts of various States, and in all the text books on Banks and Banking, and the powers of National Banks, without exception.

POINT VI.

It follows, therefore, that the judgment of the Supreme Court of the State of New York, and of the Court of Appeals of the State of New York, should be affirmed, and that this case should be remanded to those Courts with directions to enter a decree accordingly.

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Office Supreme Court U. S.
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JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 146.

THE THIRD NATIONAL BANK OF BUFFALO, N. Y.,
PLAINTIFF IN ERROR,

vs

THE BUFFALO GERMAN INSURANCE COMPANY.

SUPPLEMENTAL BRIEF FOR THE BUFFALO GERMAN INSURANCE COMPANY, THE DEFENDANT IN ERROR.

We wish to ask the Court's attention to a brief resume of the cases cited by the respective parties on this argument, for the purpose of emphasizing the claim made in behalf of the Defendant in Error that the cases cited by the counsel for the plaintiff in error belong to a class of cases which are recognized by all the text-book writers on the subject to which they relate, but which are classed under a different head and under different principles from those cases cited on behalf of the defendant in error.

The facts in none of the said cases are parallel or similar to the facts in this case, and it may be conceded that they are good law without at all affecting the claim herein of the defendant in error.

In the case of the *First National Bank of Xenia*, Ohio, vs. *Stewart* and *McMillan*, administrators, 107 U. S., 676, the bank had taken thirty shares of its own stock, which had been

issued to the defendant's testator and held the same as security for a debt due from him to the bank. Default having been made, the bank sold the stock and applied the proceeds to the payment of its debts. The administrators sued the bank to recover the amount of the proceeds of the sale, on the ground that the bank had no right to take the security; it being prohibited from so doing by the Act of Congress.

Mr. Justice FIELD in rendering the opinion of the Court says:

"While this section in terms, prohibits a banking association from making a loan upon the security of shares of its own stock, it imposes no penalty, either upon the bank or borrower, if a loan upon such security be made. If, therefore, the prohibition can be urged against the validity of the transaction by anyone except the government, *it can only be done before the contract is executed,* while the security is still subsisting in the hands of the bank. It can then, if at all, be invoked to restrain or defeat the enforcement of the security. When *the contract has been executed,* the security sold, and the proceeds applied to the payment of the debt, the Courts will not interfere with the matter. Both *bank* and *borrower are in such case equally the subjects of legal censure,* and they will be left by the Courts where they have placed themselves.

There is another view of this case. The deceased authorized the bank, in a certain contingency, to sell his shares. Supposing it was unlawful for the bank to take those shares as security for a loan, it was not unlawful to authorize a bank to sell them when the contingency occurred. The shares being sold pursuant to the authority, the proceeds would be in the bank as his property. *The administrators, indeed affirm the validity of that sale by suing for the proceeds.* As against the deceased, however, the money loaned was an offset to the proceeds. In either view the administrators cannot recover."

The Court thus shows that where there is an executed con-

tract, the parties to which have been equally guilty of breaking the law, the one in borrowing money on a security which the bank had no right to take; and the other, in loaning money on a security which it had no right to take, that the law would leave them where they had placed themselves, and would afford neither a remedy as against the other for their illegal acts; but in this case the Court suggests the second way out of the difficulty which would relieve the bank from any illegal act and make its sale of the stocks which it held a valid transaction.

In the case of *Union National Bank vs. Matheus*, 98th U. S., 621, the bank was not a direct party to the original transaction of the giving of the mortgage. In that case the payee of a note who held a trust deed as security for the payment of a note borrowed on his own note certain moneys from the National Bank and assigned to the bank as security for the payment of the same the note which he held and the trust deed; and on default being made in the payment of his note, the bank sold the land under the deed of trust, and the Court held that it had the right to do so. *The bank had actual possession of the trust deed or mortgage*, and obtained it in such a way that it would seem that it should have the right to sell the property and satisfy its debt; however, so good a justice as Mr. Justice MILLER dissents from the opinion of the Court upholding that right in the bank.

In the case at bar the testimony shows that the loan to Levi was made upon the faith of Levi's ability to pay, as he was known to be good, and not upon the alleged lien of the stock. *The bank did not have the stock;* and therefore, it is not called upon to surrender the stock as it never had it to surrender.

In this particular the case at bar differs from every case cited by the counsel of the plaintiff in error.

The case of *Thomas vs. St. Nicholas Bank*, 146 U. S., 240 is not a case in point. That was an action on a check which had been over-certified, in violation of the provisions of the Revised Statutes. The same statute which prohibits the over-certifying

of checks by banks, provides that "a check certified by a duly authorized officer of the bank when the customer had not on deposit an amount of money equal to the amount specified in the check certified, shall, nevertheless, be a good and valid obligation against the bank."

In the case of the *National Bank of Genesee* against *Whitney*, 103 U. S. 99, *the bank had possession of the mortgage* which it held as security for the loans it might make to Whitney; and it sought to enforce its claim against the surplus monies arising on a foreclosure under a prior mortgage. The bank held this mortgage as security for future loans, and when the case was before our Court of Appeals in the 71st N. Y. page 161, this Court held that the mortgage was void; but the Supreme Court of the United States reversed the decision. My colleague, on the first argument before the Appellate Division, Mr. Theodore Bacon, argued the *Whitney* case in the Supreme Court of the United States, and knew all of the questions involved thoroughly; and did not hesitate in the court below nor would he in this court, had he lived to be here, fail to proclaim the broad difference between the *Whitney* case and the case at bar; the one being a case to enforce a lien under a mortgage which the bank had taken as security for its loan; and the other being to create a lien in favor of the bank where it had not possession. It is *malum prohibitum*, and recognized as such by every Court that has passed upon the subject.

The *Whitney* case must be considered as decisive of the questions involved in it, this Court having decided it; yet in this Court Mr. Justice MILLER and Mr. Justice HARLAN dissented.

Knight vs. The Old National Bank, 3 Cliff., 429, and the long list of cases cited therein, which are also cited by the counsel on pages 10, 11 and 12 of his brief, is a case in the Circuit Court, Rhode Island District, decided in June, 1871. It simply decides that a National Bank may by a by-law prohibit the transfer of its stock by a stockholder indebted to it if it does not undertake to create a lien for the amount of its indebtedness upon the stock. This case was disapproved in Bullard vs.

The Bank, 18 Wall., 589-598, when Mr. Justice CLIFFORD dissented from the Bullard case because of the opinion he had expressed in the case of Knight vs. the Bank. The case was further practically overruled in Johnson vs. Laflin, 103 U. S., 800-806, when Justice FIELD, writing an opinion said, that "under the pretense of prescribing the manner of a transfer, the association cannot clog the transfer with useless restrictions or make it dependent upon the consent of the Directors or of the stockholders." The case is not only overruled, but is not in point, for the reason that even if it were good law, the by-law is not the same as the by-law in this case, in that here the by-law provides that there shall be a lien upon the stock for the amount of the stockholders indebtedness.

Moore vs. The Bank, 111 U. S., 163-166, is a case that holds a Bank is not liable for stock fraudulently issued by its secretary and is not at all in point.

Union Bank vs. Laird, 2 Wheat., 390, arose under the Statute of 1811 and is not in point.

Brent vs. Bank of Washington, 10 Peters, 615, arose under the Act of 1797, and has nothing to do with the questions in this case.

This review of the cases cited by the plaintiff in error shows that the first, *The National Bank of Xenia, vs. Stewart*, is the only one that touches on the subject of this litigation. And there the question was decided on other grounds. The administrators having affirmed the sale of the stock sued for the proceeds. And the Court held them too late to avail themselves of any invalidity in the pledge.

In the *Union National Bank vs. Mathews*, the question involved arose on a mortgage which the bank *had taken*.

In *Thomas vs. St. Nicholas Bank*, the question involved arose on the over-certification of a check.

In the *Whitney* case the question arose out of a mortgage taken by the bank. *So that none of these case are pat.*

ON THE OTHER HAND,

every case cited on behalf of the defendant in error arose on facts which were similar, and in several cases identical with the case at bar.

They all deal with the question of the power of a bank to enforce a lien which it claimed on its own stock.

In the first place the Text Writers are cited at page 19 of the defendant's in error brief—all on the point at issue in this case —that a national bank cannot acquire a lien on the stock of its stockholder by by-laws or notices.

Then come the cases, every one of which is *pat.*

The case of *Feckheimer vs. The National Ex. Bank of Norfolk, Va.*, 79-80, which is in all but names of parties the identical case in issue. It will be found in full at page 16 et. seq. of brief for defendant in error.

Also, *Evansville National Bank vs. Metropolitan National Bank*, 2 Bissell's R. 527. Set out in full at page 14.

Bank vs. Lanier, 11 Wallace 369-378.

Bullard vs. Bank, 18 Wallace 589-598.

2nd National Bank of Louisville vs. State Bank of New York, 10 Bush (Ky.) 367-375.

Conkling vs. 2nd National Bank of Oswego, 45 N. Y. 655.

Driscoll vs. The West, Bradley and C. M. Co., 59 N. Y. 96.

Continental Bank vs. Eliot National Bank, 7 Fed. Rep. p. 376.

Orleans National Bank vs. B. S. Wills & Co., 10 Fed. Rep. 330.

So far as I know, none of these cases have been criticised, distinguished or reversed.

They do not conflict with the other cases of the *Whitney* class.

The contention of the defendant in error is supported by reason and upheld by authority strong and unequivocal, and we believe the judgment herein should be affirmed.

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